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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEION HAGGERTY, Defendant and Appellant.	B205550 (Los Angeles County Super. Ct. No. TA083294)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald V. Skyers, Judge. Affirmed as modified and remanded.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted defendant Deion Haggerty of nine offenses arising out of a shooting incident on January 16, 2006: the attempted willful, deliberate, and premeditated murders of Nathaniel Gutierrez, Royce Hollingworth, and Ineatha Allen in violation of Penal Code sections 664 and 187, subdivision (a) (counts 1-3);[1] assault by machine gun or assault weapon (§ 245, subd. (a)(3)) against the same three victims (counts 4-6); possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 7); and shooting at an occupied motor vehicle and an inhabited dwelling house (§ 246) (counts 8 and 9). The jury found true the special allegations of personal firearm use by a principal (§ 12022.53, subds. (c) & (e)(1)) as to the three attempted murder counts;[2] it also found true the special gang allegations (§ 186.22, subd. (b)) as to all nine counts. The trial court imposed three consecutive life terms for the attempted murders, adding 20-year terms for the firearm enhancements as to those offenses. It stayed imposition of middle term sentences on the three assault convictions pursuant to section 654. Consecutive terms of 8 months, 20 months, and 20 months were imposed for the remaining convictions. The court struck punishments as to the gang findings on all counts in the interest of justice (§ 186.22, subd. (g)).[3]

In his timely appeal, defendant contends: (1) there was constitutionally insufficient evidence to support the criminal gang findings because the prosecution failed to establish the "primary activities" element of the enhancement; (2) the trial court prejudicially erred and

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[1] All further statutory references shall be to the Penal Code, unless otherwise specified.

[2] The jury found as to the assault on Gutierrez that "a principal personally used a firearm" within the meaning of section 12022.5, subdivisions (a) through (d). As we explain *infra*, those sections apply to personal firearm use, not liability as a principal.

[3] The court's striking of all additional punishment for the gang enhancements in the interest of justice under section 186.22, subdivision (g), does not render moot defendant's appellate challenge to the sufficiency of evidence supporting the gang findings. The 20-year firearm enhancements imposed were predicated on a finding that defendant had acted in violation of the gang statute, section 186.22, subdivision (b). (§ 12022.53, subd. (e)(1).) That is, although there was no finding of personal firearm use by defendant, but rather that a principal personally used the weapon, defendant received the 20-year term generally applicable for personal use (§ 12022.53, subd. (c)), based on the gang findings.

thereby violated defendant's constitutional due process rights by admitting evidence that defendant had been arrested for murder in 1996; (3) the matter must be remanded for the trial court to exercise discretion as to imposition of concurrent or consecutive terms for the attempted murders; (4) imposition of punishment on counts 7 and 8 must be stayed under section 654; (5) defendant was denied adequate local conduct credits; and (6) the firearm enhancement for the firearm possession conviction must be stricken.

We agree with defendant that a remand is necessary for the exercise of discretion as to imposition of concurrent or consecutive terms for the attempted murders, that defendant is entitled to additional local conduct credits, and the firearm enhancement for the firearm possession conviction must be stricken. The judgment is affirmed in all other respects.

STATEMENT OF FACTS

Prosecution

On January 16, 2006, at 11:45 p.m., Ineatha Allen had been visiting the residence of her grandmother, Ineatha Cook, on 1543 East 121st Street in Los Angeles. Cook's five grandchildren were at the residence. Allen's cousin, Nathaniel Gutierrez, was in the front yard with his friend, Royce Hollingworth. Allen began to back her Ford Expedition out of the driveway, but stopped when she heard gunfire. Gutierrez said, "hit the ground." Allen ducked down and hid under the dashboard. At least nine bullets hit her truck, leaving holes and causing fragments of the car to strike her. The gunshots came from the passenger window of a blue Chevrolet Celebrity, which drove away after the shooting stopped. Gutierrez got up from the ground and helped her to the house.

Gutierrez was also living at the Cook residence at the time. He recalled being in the front yard with Hollingworth, listening to the radio in his friend's car, which was parked on the front lawn. Hollingworth was sitting in his car, drinking a beer. The car door was open, and Gutierrez was standing in front of it, 10 to 15 feet from the street. He saw the blue Chevrolet

Celebrity drive past them with two or three persons inside. As he watched, the head of another person "popped up" in the back seat. Gutierrez told Hollingworth they should go inside in case of "gang . . . trouble." He was familiar with the Bounty Hunter Bloods gang and the Carver Park Crips gang. Gutierrez's brother was a member of the latter gang. The brother had lived in the Cook residence, but was currently housed in a Youth Authority facility. After driving approximately one-half mile down East 121st Street, the Celebrity made a U-turn and drove back toward them. Gutierrez was watching the car; Hollingworth was tuning his car radio. A rifle barrel emerged from the back driver side window. The Celebrity slowed down to a "crawl[]" and almost immediately the rifle began to fire. Bullets sprayed toward his neighbor's house, the Cook residence, and in his direction. Gutierrez yelled for Hollingworth to "watch out." Bullets hit Hollingworth's car, but did not strike him. The firing lasted one to two minutes before the car drove away, eastbound on 121st Street. Approximately nine bullets struck the Cook residence, leaving bullet holes in the wall and window. A bullet fragment was found inside Cook's residence.

According to Deputy Raul Zuniga, the sheriff's department received a call reporting the shooting incident just before midnight. Deputy Zuniga was in a marked patrol car. At 12:26 a.m., he saw the blue Celebrity traveling eastbound on Imperial Highway. At first, the deputy only saw the driver's head, but as he approached from behind, he saw two more heads "pop up" from the front passenger and back seats. As Deputy Zuniga followed the Celebrity, it entered a parking lot inside the Nickerson Gardens housing project. Before the deputy switched on his emergency lights or siren, the Celebrity slowed, the back and front passenger doors suddenly opened, and the passengers ran out of the car.

Deputy Zuniga pulled alongside the Celebrity, exited the patrol car, drew his handgun, and pointed his flashlight at the Celebrity. The only occupant was defendant, the driver, who threw a large handgun onto the front passenger side floorboard. Defendant shifted the gear into park, jumped out of the car, and surrendered to the deputy. In addition to the handgun on the floorboard, there was a rifle in the backseat. The rifle's empty ammunition clip was attached. There were live rounds in the handgun, and 11 shell casings on the rear floorboard

and backseat. Efforts to find the two African-American males who ran from the Celebrity were unsuccessful. When arrested, defendant gave the officer a home address in the housing project close to the location where the deputy stopped him.

Investigating Officer Gerald Grenow of the Los Angeles Police Department took part in the recovery of nine 7.62 caliber shell casings at the shooting scene. The rifle found in the Celebrity was a Mack 90 Sportster 7.62 caliber assault rifle. The 11 expended casings found in the Celebrity and the 9 casings at the shooting scene had been fired from that assault rifle. None of the fingerprints found on the Celebrity matched defendant or any known suspect; the firearms had no fingerprints.

After his arrest, defendant waived his constitutional rights and agreed to talk to Officer Grenow. He denied having anything to do with the drive-by shooting, admitting only that he picked up a friend named Randy and drove him to Nickerson Gardens. When stopped by the police, Randy fled for reasons unknown. Defendant knew nothing about the firearms found in his car. After being arrested and released on bail, defendant failed to appear at a scheduled court hearing. He was later arrested in New Mexico.

Officer Francis Coughlin testified as an expert on street gangs, including the Bounty Hunters and others located around the Nickerson Gardens housing project. In the past 10 years, Officer Coughlin has been assigned to a gang unit in which he was responsible for gathering intelligence, monitoring crime trends, and suppressing criminal activity of a number of gangs in the Southeast Division, including the Bounty Hunters. For the five years leading up to defendant's trial, his primary gang responsibility was to monitor the Bounty Hunters. In that capacity, he had met hundreds of gang members.

The expert defined a criminal street gang as an association of individuals sharing a common identify with the purpose of committing crimes including robbery and murder to "create an atmosphere of intimidation in the community." They typically operate on a "business" model whereby members sell narcotics in the community to raise money. The gang members use that money to buy the weapons needed to fund their narcotics enterprise, protect themselves, commit robberies, and to sustain themselves, as most members are not gainfully

employed. The Bounty Hunters have between 700 and 800 members, but only a fraction are "active"—that is, known to be committing crimes. Status within the gang is based mainly on committing crimes for the gang's benefit.

The Bounty Hunters claim the Nickerson Gardens housing project as its territory. The gang protects that territory, meaning that the members prevent others from entering and conducting narcotics sales, robberies, and painting graffiti. They will shoot rival gang members who attempt to do so. The Bounty Hunters use "B.H." as a symbol; their color is red. Defendant's gang moniker was "D" or "D-Man."

At the time of the shooting, the gang was very active. Its primary enemies were the Grape Street Crips and the Carver Park Crips. The officer was not aware of specific criminal acts committed by the Bounty Hunters against those rivals, but they were engaged in a "constant and ongoing feud" at the time. Although the prevalence of drive-by shootings by gangs had lessened recently, such crimes were "still pretty common" among the housing project gangs. Officer Coughlin estimated that he had investigated more that a hundred drive-by shootings. Typically, two or more gang members took part in those shooting. Officer Coughlin had never heard of a person being duped by gang members into helping them commit a drive-by shooting on the gang's behalf.

Active members of the Bounty Hunters were subject to an injunction because it had become "such a violent gang." The injunction provided that gang members who had been served with the order were subject to arrest if found "hanging out in public inside the Nickerson Gardens with another [documented] gang member." Two hundred Bounty Hunters, including defendant, were subject to the injunction. Officer Coughlin had made "numerous" arrests of Bounty Hunters pursuant to the injunction. Defendant had been convicted for violating the injunction, based on an arrest on May 17, 2005. The expert considered defendant to be a Bounty Hunter based on his injunction arrest, his arrest for the underlying offenses, and his having admitted membership on various occasions, including approximately 18 days before the shooting incident. From the time of the injunction arrest until the shooting incident, the

expert considered defendant to be an "inactive" gang member in the sense that he was not known by the police to have committed gang-related crimes during that time period.

The expert testified to two predicate gang offenses committed by Bounty Hunters other than defendant. In September 2004, Robert Lee Ford was convicted of murder. Cornelius Stewart was convicted for selling marijuana in March 2005. The expert had also witnessed a Bounty Hunter named Randy "Little Rancho" Collier commit a shooting during the same general time period as the underlying shooting incident.

Based on a hypothetical set of facts consistent with the prosecution's case, Officer Coughlin opined the shooting would have been committed to benefit the Bounty Hunters because it would have created an atmosphere of intimidation and fear, sending a message to gang rivals that the Bounty Hunters would use deadly force to protect their territory and their members. The fact that defendant fled to the Nickerson Gardens housing project after the shooting corroborated that the shooting was conducted for the gang because the Bounty Hunters considered the project to be their "safe haven."

Defense

Defendant testified on his own behalf. At the time of the shooting, he was 32 years old and living with his girlfriend and her children on East 114th Street—close to the Nickerson Gardens housing project. He had been working "[o]ff and on" with a "temp agency" since 2001 as an electrician and technician. Defendant had been a member of the Bounty Hunters, but stopped being an active member when he moved to Texas in 1992, where he lived for approximately eight years. While in Texas, he was convicted of a felony and served jail time. Upon his return to California, defendant was steadily employed and took no part in any gang activities.

On the day of the shooting, he worked at a Walgreens store in Ontario doing electrical installations from 3:00 p.m. to 10:00 p.m. While driving his blue Celebrity home, an acquaintance named Randy called, requesting a ride because he was stranded in Compton.

Defendant found Randy and another male in Compton, standing in front of a residence near Long Beach Boulevard. When defendant picked them up, he had no suspicion that Randy had any kind of criminal behavior in mind. At the time, defendant was talking to his girlfriend on his cell phone. Randy got into the front passenger seat and the stranger went to the backseat. Defendant was not paying attention to his passengers and did not notice them bring the rifle into the car. Indeed, prior to the shooting, defendant saw no weapons inside the car. After completing his call, defendant and Randy engaged in small talk. Defendant followed Randy's directions onto the 105 Freeway and then to a liquor store in Wilmington where Randy purchased some liquor. Randy directed defendant down 124th Street to 121st Street near Compton Avenue. When Randy told defendant to make a U-turn, defendant began to ask Randy where they were going. Suddenly, defendant heard gunshots being fired out of his car. Defendant saw no gang members on the street and nothing suspicious. He had given no one permission to take a gun into his car and had no idea a shooting would occur. At no time did defendant handle a gun inside the car.

Defendant drove away from the shooting location, down Compton Boulevard, across Central, and parked. He swore at his passengers for shooting out of his car, and they got into "a heated argument."[4] When some residents came outside and approached them, they reentered the car and drove to the Nickerson Gardens housing project. The patrol car began to follow him. Defendant stopped the car and the passengers jumped out and ran away. There was no gun on defendant's lap or anywhere within his reach. When interviewed, defendant did not tell the police officer the "whole truth" out of fear for his family and "the stuff [he was] losing because of the situation [he] was put in." Defendant had no reason to take part in the shooting. He had a good job and family life, and no conflict with anyone on 121st Street or any Carver Street Crip.

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[4] On cross-examination, defendant said he only believed the shooting came from the back seat, so his anger was directed solely at the person who had come along with Randy.

When he was released on bail, defendant attended a court hearing on this matter. His counsel approached him in the courtroom and told him the prosecution was about to increase the charges against him to three attempted murders. Defendant "got spooked," left the courthouse, and jumped bail—fleeing to New Mexico, where he was later arrested.

With regard to his arrest pursuant to the gang injunction, defendant explained that he had been walking down the street with a friend on their way to watch a Lakers playoff game when the police pulled them over. Defendant gave the officer accurate information about his current employment, but did not say his gang moniker was "D"—when he was running with the Bounty Hunters, he was called "Dead Bone."

DISCUSSION

Sufficiency of Evidence

Defendant contends there was constitutionally insufficient evidence to support the criminal street gang findings because the prosecution failed to establish the "primary activities" element of the enhancement. According to defendant, Officer Coughlin's expert testimony was too vague, weak, and conclusory to establish that members of the Bounty Hunters consistently and repeatedly committed crimes listed in the gang statute. As we explain, the prosecution presented solid, credible evidence from which the jury could reasonably infer the chief component of the gang's existence was the commission of enumerated crimes.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence

in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "The substantial evidence standard of review applies to section 186.22 gang enhancements." (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

The gang enhancement of section 186.22, subdivision (b), required the prosecution to prove defendant committed the offenses for the benefit of a criminal street gang. Section 186.22, subdivision (f), defines a criminal street gang for purposes of these provisions as "'any ongoing organization, association, or group of three or more persons . . . having as one of its primary activities the commission of one or more of [certain enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.' [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323, italics omitted.)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*People v. Sengpadychich, supra,* 26 Cal.4th at pp. 323-324.) Also sufficient might be expert testimony that the gang was primarily engaged in certain offenses. (*Ibid.*)

"Past offenses, as well as the circumstances of the charged crime, have some tendency in reason to prove the group's primary activities, and thus both may be considered by the jury on the issue of the group's primary activities." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465, citing *People v. Sengpadychich, supra,* 26 Cal.4th at pp. 320, 323.) On the other hand, as we have cautioned, "[c]onclusional testimony that gang members have previously engaged

in the enumerated offenses, based on nonspecific hearsay and arrest information which does not specify exactly who, when, where and under what circumstances gang crimes were committed, does not constitute substantial evidence." (*In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462; see also *People v. Perez* (2004) 118 Cal.App.4th 151, 160 [expert testimony based on weak, insubstantial evidence will not suffice].)

Here, while the prosecution's "primary activities" evidence was not the subject of direct evidence, there was sufficient solid, reliable evidence from which a jury could reasonably find the commission of the enumerated criminal acts by members of the Bounty Hunters was the gang's principal activity, rather than merely an occasional or subsidiary aspect of gang membership. The fact that the prosecution did not ask for, and the gang expert did not offer, a direct opinion on whether the Bounty Hunters' primary activities were criminal, is not determinative. The crucial issue is whether there was solid and credible evidence permitting a reasonable inference as to the required element. Officer Coughlin's testimony did not reduce to conclusory and vague assertions concerning the nature and frequency of criminal activities by the Bounty Hunters. In addition to the two predicate offenses by gang members—Ford's 2004 murder and Stewart's 2005 narcotics sales—the expert testified that he witnessed gang member Collier commit a shooting during the relevant time period. He also offered a reasonable evidentiary basis for believing that the numerous offenses arising out of the shooting incident in front of the Cook residence were committed by two Bounty Hunters along with defendant. (See *People v. Duran, supra*, 97 Cal.App.4th at p. 1465 [finding evidence of gang's primary activities was corroborated by the predicate crimes evidence used to show a pattern of gang activity].)

Defendant asserts those specific gang-related crimes cannot be considered as evidence of consistent and repeated criminal activities by the gang because Officer Coughlin testified the Bounty Hunters were comprised of between 700 and 800 members. That is, the crimes identified by the expert show criminal activity by only a small fraction of the Bounty Hunters. We note, however, that the expert explained that he considered gang members to be "active" only when known to be engaged in committing crimes and, in that sense, only a fraction of the

Bounty Hunters were active at any time. Certainly, there was no evidence to suggest the Bounty Hunters were predominately involved in licit activities. In any event, Officer Coughlin's testimony supported the reasonable inference that those crimes were representative of the gang's chief activities. Based on his own investigations and conversations with Bounty Hunters, the expert testified that the gang had no appreciable source of legitimate funding. Rather, the members conducted narcotics sales to support themselves and to buy the weapons they needed to protect their narcotics enterprise and to conduct robberies. The Bounty Hunters not only used those weapons to protect their territory from rival gang incursions, but commonly committed drive-by shootings to intimidate rivals and instill a sense of fear in the community. "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*People v. Duran, supra,* 97 Cal.App.4th at p. 1465.)

As defendant points out, the gang expert failed to identify and enumerate specific drive-by shootings committed by Bounty Hunters. Nevertheless, Officer Coughlin testified that his primary assignment over the past five years was investigating the Bounty Hunters and that he had personal knowledge of at least 100 such shootings. That testimony, as corroborated by the underlying shooting incident, certainly supported the reasonable inference that the Bounty Hunters' recourse to drive-by shootings was not extraordinary, but consistent and repeated. Evidence of the gang injunction provided additional corroboration that the specific acts of enumerated crimes were representative of the gang's primary activities. The officer testified that the gang's violent conduct had caused the Bounty Hunters to be subject to an injunction proscribing members from meeting in gang territory, and that defendant and many others had been arrested pursuant to that injunction during the relevant time period.[5]

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[5] A gang "injunction imposes limitations on otherwise lawful activities on any person who is a gang member *or acting with a gang member.* [Citations.] For purposes of a gang injunction, a person is a member of a gang if he or she 'is a person who participates in or acts

This is not a case like *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612, where insufficient evidence of the gang's primary activities was found because the gang expert testified that the defendant's gang had been involved in assaults, murders, and other crimes, but neither gave any specifics as to the circumstances of those crimes nor offered any foundation for his opinion. (See *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.) Similarly distinguishable is *People v. Perez, supra,* 118 Cal.App.4th 151. There, the only crimes potentially attributable to the defendant's gang were a beating six years before the subject crime and a few shootings within a week of the subject crime. (*Id.* at p. 160.) Officer Coughlin identified enumerated crimes by Bounty Hunters in 2004 and 2005, culminating in the subject crimes in 2006. (Cf. *People v. Vy* (2004) 122 Cal.App.4th 1209, 1225-1226 [finding "the existence of three violent felonies by a gang as small as YA over less than three months to be sufficient to satisfy the 'primary activities' element. Stated otherwise, the fact that YA's level of criminal activity lay dormant for most of its existence does not preclude a finding that it was a gang under the enhancement statute, where there was evidence of consistent and repeated criminal activity during a short period before the subject crime"].)

Read in the light most favorable to the prosecution, the evidence of specific, enumerated crimes (including murder, attempted murder, and narcotics sales) committed by defendant and other Bounty Hunters from 2004 through 2006, along with testimony that the gang supported itself and funded its illegal activities by narcotics sales and robberies—and would use drive-by shootings to protect its territory and intimidate rivals—amounted to solid and reliable evidence that in 2006, the Bounty Hunters constituted a "criminal street gang" in that those criminal activities were not merely occasional, isolated acts that happened to be committed by gang

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in concert with an ongoing organization, association or group of three or more persons . . . having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members individually or collectively engage in the acts constituting the enjoined public nuisance. The participation or acting in concert must be more than nominal, passive, inactive or purely technical.' [Citation.]" (*People ex rel. Reisig v. Broderick Boys* (2007) 149 Cal.App.4th 1506, 1517.)

members for personal reasons. (See *People v. Sengpadychith, supra*, 26 Cal.4th at p. 323; *People v. Gardeley* (1996) 14 Cal.4th 605, 620.)

Impeachment of Defendant Based on Prior Murder Arrest

Defendant contends the trial court prejudicially erred in admitting evidence for purposes of impeachment that defendant had been arrested for murder in 1996. He asserts that claimed error had the additional consequence of violating his constitutional right to due process. As we explain, the trial court's ruling was consistent with applicable evidentiary law and fully within the legitimate bounds of its discretion. Accordingly, there was no reasonable likelihood of undue prejudice and no constitutional violation.

In a conference outside the jury's presence before the defense case began, the prosecutor cautioned that if defendant were to testify that he had no significant criminal history—that he had never been in trouble with the law, consistent with a hypothetical the defense had posed to the gang expert—it would expose defendant to potentially damaging questioning based on defendant's having been arrested for murder. Defense counsel agreed that doing so would "open[] the door." The trial court also agreed: If defendant testified in that manner, the prosecution would not be prohibited "from showing that [defendant] does not have a clean record."

On cross-examination, defendant was asked why he did not give the interviewing officers information he possessed concerning Randy's whereabouts. Defendant said he was frightened. He had "never been in a situation like that before. So I don't really know what to do or what to expect from the outcome of me giving the information up. I didn't really know what was going to happen to me or my family." The prosecutor responded: "Let's talk about that. You've never been in that situation before, you say. You mean as far as being arrested for a serious crime?" The defense objected. In a conference at sidebar, counsel argued defendant had not "open[ed] the door" to questioning about the prior murder arrest. The trial court disagreed, finding that by volunteering that he had never been in "this situation" and that he was too scared to give information to the police, defendant was implying he was a neophyte in

such matters. The prosecutor argued that defendant had opened himself up to such questioning by implying that he lied to the police because of his inexperience with being the subject of a criminal investigation. The court found defendant's answer implied a criminal naivety that invited a challenge based on his prior arrest. "I'll say for the record that it is highly prejudicial, but I think it was brought on by the defendant, and the impression that he has left with the jury. I am compelled to allow the impeachment to it. Therefore, I'm going to allow it."

When questioning resumed, defendant admitted that on October 23, 1996, he was arrested and charged with murder. In connection with that arrest, he was interviewed by the police. Defendant explained, however, that the reason he was particularly afraid during his interview concerning the current charges was that he was afraid of retaliation by the persons who had shot out of his car and were still at large. Later, he admitted the two situations were similar in that on both occasions he had been interviewed on a serious criminal charge. When questioned by defense counsel, defendant testified that he was not convicted of the 1966 murder charge, and the investigating officers did not ask him to implicate anyone else. Nor at that time did he have a steady relationship and family life.

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65 ["A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]"].) Defendant argues that admission of the prior murder arrest was irremediably prejudicial because of the inflammatory and heinous nature of the charge and, to the extent there was any legitimate basis for introducing the prior arrest, there was no need to mention the nature of the charge. We disagree.

Impeachment evidence is generally relevant and its admission is subject to the trial court's discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 534; *People v. Martinez* (1996) 51

Cal.App.4th 537, 542-543 [after defendant testified she would not shoot anyone, trial court properly admitted prior statement that she had shot at people before]; see Evid. Code, § 210.) There was no abuse of discretion in the court's evaluation of the impeachment evidence under Evidence Code section 352, which provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." As the court found, defendant attempted to justify his failure to provide investigating officers with relevant, available information by asserting that he was frightened, never having been in a similar situation. Such professed naivety was belied by this prior murder arrest, and the trial court had good reason to find impeachment justified to prevent the witness from misleading the jury. As defendant admitted, he had previously been the subject of a police interview pursuant to a charge for a crime no less serious than those facing him on his current arrest. For that reason, the nature of the prior charge was highly probative for impeachment purposes.

Nor do we find any reasonable likelihood of prejudice in the legal sense. "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Morton* (2008) 159 Cal.App.4th 239, 249.) Contrary to defendant's assertion, this was not an instance of admitting a defendant's prior bad acts to show a criminal predisposition. Instead, the prosecution's examination was limited to challenging the basis for defendant's naivety excuse. Further tending to eliminate any potential prejudice was defendant's unchallenged testimony that he was not convicted for the murder and the prior situation was distinguishable because it did not involve the likelihood of retribution by gang members who avoided arrest. Finally, this aspect of the prosecution's cross-examination was hardly crucial to his defense. Not only did the presence of weapons and expended bullets found in defendant's car render his exculpatory version of events untenable, but wholly apart from his misrepresentations during the police interview, the notion

that he picked up "Randy" and a stranger without noticing the assault rifle strains credulity. Any error would have been harmless whether assessed in terms of *People v. Watson* (1956) 46 Cal.2d 818, 836, which asks whether it is reasonably probable defendant would have achieved a more favorable result if the court had not admitted the evidence, or the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.

As the Attorney General points out, defendant failed to object on due process grounds at trial. However, a "defendant may make a very narrow due process argument on appeal" notwithstanding failure to object on that ground when the appellate argument is that the "asserted error in admitting the evidence over [the defendant's] Evidence Code section 352 objection had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) That narrow claim fails in light of the foregoing analysis. (*People v. DePriest* (2007) 42 Cal.4th 1, 19 ["[N]o separate constitutional discussion is required, or provided, where rejection of a claim that the trial court erred on the issue presented to that court necessarily leads to rejection of any constitutional theory or 'gloss' raised for the first time here"].) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (E.g., *Id.* at p. 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Here, the challenged evidence was properly admitted on a relevant and nonprejudicial ground. (See *People v. Falsetta*, *supra*, at p. 913.)

Discretion to Impose Consecutive or Concurrent Sentences

Defendant contends—and the Attorney General agrees—the matter must be remanded for the trial court to exercise discretion as to imposition of concurrent or consecutive terms for the attempted murder convictions. We accept the concession.

At sentencing, the trial court apparently accepted the prosecutor's reference to *People v. Oates* (2004) 32 Cal.4th 1048 as authority for imposing mandatory consecutive sentencing.

The *Oates* decision, however, which concerns the application of the various levels of enhancements under section 12022.53, does not address the issue of consecutive sentencing for the substantive offenses to which the enhancements apply. As defendant explains, the mandated consecutive sentencing provision in section 12022.53, subdivision (c), requires that the *enhancement* be imposed consecutively to sentence on the substantive offense. Because the sentencing court appeared to be mistaken as to the scope of its discretionary powers, a remand for resentencing is appropriate to permit the court's exercise of informed discretion. (See, e.g., *People v. Jones* (2007) 157 Cal.App.4th 1373, 1383.)

Multiple Punishment for Weapon Possession Conviction

Defendant argues section 654's proscription against multiple punishments requires the staying of defendant's sentence for being a felon in possession of a firearm (count 7) because it was necessarily based on constructive possession of the rifle, which was essentially the same conduct as that supporting the convictions for shooting at an occupied motor vehicle and inhabited dwelling house (counts 8 and 9). However, as the Attorney General explains, the evidence supported a finding that defendant's intent in possession of the handgun was separate and independent of the shooting.

"Subdivision (a) of section 654 provides that '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' This provision 'protects against multiple punishment, not multiple conviction. [Citation.]' [Citation.] Although it 'literally applies only where such punishment arises out of multiple statutory violations produced by the "same act or omission,"' we have extended its protection 'to cases in which there are several offenses committed during "a course of conduct deemed to be indivisible in time." [Citation.]' [Citation.]" (*People v. Oates, supra*, 32 Cal.4th at p. 1062.) "[I]t is clear that multiple punishment is proper where the evidence shows that the defendant possessed the firearm

before the crime, with an independent intent." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1144.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143.)

At trial, the evidence established defendant was the driver. All expended bullet casings were traced to the rifle, which was found in the back seat after defendant's two passengers fled. Victim Gutierrez saw the shots fired from a long barrel in the back seat. In contrast, the handgun was found in the front seat after Deputy Zuniga saw defendant toss it on the floorboard. Accordingly, it could reasonably be inferred that defendant possessed the handgun before and after the shooting, and for purposes other than committing the January 16, 2006 shooting. Section 654 therefore does not bar imposition of separate punishment for the section 12021, subdivision (a)(1) conviction. (See *People v. Jones, supra*, 103 Cal.App.4th at pp. 1143-1145.)

Multiple Punishment for Shooting at an Occupied Vehicle

As to count 8, defendant correctly points out that the conduct which supported the attempted murder convictions as to either Allen or Hollingworth must have been the same as that which supported the single conviction for shooting at an occupied vehicle. Those two victims were the only persons who occupied the vehicles involved in the shooting. The 20-month term imposed on count 8 must therefore be stayed under section 654.

Local Conduct Credit

The Attorney General agrees with defendant's contention that he was denied adequate local conduct credits because the trial court credited defendant only for the actual time he spent in custody pending trial—610 days. We accept the concession. Subject to the 15 percent limitation under section 2933.1 applicable to defendant's attempted murder convictions, defendant was entitled to 91 days of local custody credits.

Firearm Use Enhancement Under Section 12022.5

With regard to the attempted murders, the jury applied section 12022.53, subdivisions (c) and (e), to find a principal personally used a firearm. However, in connection with the assault on Gutierrez (count 4), the jury found a principal personally used a firearm within the meaning of section 12022.5, subdivisions (a) through (d). As defendant argues, and the Attorney General concedes, section 12022.5 requires a finding of personal firearm use. Because there was no evidence of such use by defendant in any of the underlying shootings, there was no evidentiary basis for imposition of the enhancement on this count. It must therefore be stricken.

DISPOSITION

The cause is remanded for resentencing to allow the superior court to consider whether to impose consecutive or concurrent sentences for the attempted murder convictions. Further, the 20-month term imposed on count 8 must be stayed under section 654, and the section 12022.5

firearm enhancement for count 4 must be stricken. Defendant is to be awarded 91 days of local custody credits pursuant to section 2933.1. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.